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Are Your 'Voluntary Benefits' Really Exempt From ERISA? It's Worth Checking

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In recent years, employers have increasingly allowed insurance companies to offer certain types of insurance (such as accident, specified disease, or critical illness insurance) for purchase by their employees at the employee's expense without contribution from the employer. These benefits are commonly referred to as voluntary benefits, and they have been the subject of recent litigation over whether they are exempt from governance by the Employee Retirement Income Security Act of 1974, as amended (ERISA).[1] This article outlines key conditions that must be met for voluntary benefits to qualify for ERISA exemption.

What are "Voluntary Benefits?"

In general, health and welfare benefits offered by employers to employees are subject to the requirements of ERISA. Voluntary benefits are generally supplemental insurance products that are made available by employers to employees on a voluntary basis and fully paid by employees. If the offer of these supplemental benefits meets certain requirements, the benefits are not subject to ERISA, and the employer therefore has fewer obligations to the participants of the plan and less involvement in the control of the plan. For a benefit to be exempt from ERISA as a voluntary benefit, the benefit must meet each of the following requirements:

1. No contributions are made by the employer;
2. Participation in the benefit program is completely voluntary for employees;
3. The only function the employer provides is, without "endorsing" the program: (i) permitting the insurer of the plans to publicize the program to employees or members, (ii) collecting premiums through payroll deductions, and (iii) remitting those premiums to the insurer; and
4. The employer receives no consideration — in the form of cash or otherwise — in connection with the benefit program, other than reasonable compensation for administrative services actually rendered in connection with payroll deductions or dues checkoffs.[2] The employer may not make any profit from providing such administrative services.

When Might an Employer Lose the Voluntary Benefits Exemption?

Employers most often lose the voluntary benefits exemption where they: (i) take an action or actions to "endorse" the voluntary benefits; or (ii) receive consideration as a result of providing the voluntary benefits. Both of these potential pitfalls are explored further below.

Endorsement

Employers have been found to improperly endorse voluntary benefits where:

- The employer negotiated the terms or design of the voluntary benefit plan, including by deciding plan terms, benefits, or eligibility requirements.
- Employees' eligibility to participate in or be covered by the plan was based on their employment status (*e.g.*, the insurer provided discounted premiums to employees).
- The employer's name became associated with the plan; for example, by distributing plan information in the employer's name, designating the employer as the plan administrator/sponsor/trustee, issuing the insurance contract in the employer's name, or distributing information that associates the plan with benefits sponsored by the employer and covered by ERISA.
- The employer permitted employees to pay for the voluntary benefits on a pre-tax basis through the employer's Section 125/cafeteria plan.

However, an employer has been found not to have improperly endorsed a voluntary benefit where:

- The employer permitted the insurer to publicize the plan to employees.
- The employer merely recommended the plan (which recommendation, by itself, was not enough to constitute "endorsement").
- The employer performed only ancillary functions with respect to the voluntary benefit plan (*e.g.*, making employees aware of the plan) and the employer's name was not used with the plan.

Consideration

An employer may be found to have received consideration for the voluntary benefits if the employer receives a discount on other benefits or receives rebates or use of commissions related to the coverage. For example, some broker arrangements allow the broker to receive commissions on voluntary benefits. If those commissions are used for the employer's benefit, such as to cover or reduce the cost of other benefits or services, the employer could be receiving "consideration," such that the ERISA exemption for voluntary benefits would become unavailable.

What if the Exemption Does Not Apply?

If the "voluntary benefits" exemption does not apply, the employer must comply with ERISA with respect to those benefits, just as it does for the other welfare benefits the employer offers to its employees. The employer's obligations would include compliance with ERISA's fiduciary obligations.

Recommended Review

Due to recent litigation raising questions around whether certain "voluntary benefits" are exempt from ERISA, we recommend that employers work with trusted benefits counsel to reexamine the following questions with respect to voluntary benefits offered to employees:

- Do employees pay all premiums?

- Is participation voluntary?
- Has the employer avoided endorsement of the benefits?
  - Check benefits guide/open enrollment materials, summary plan descriptions/benefits booklets, insurance policies, and welfare wrap plan documents. Do these materials imply that the employer is endorsing the voluntary benefits?
  - Review whether the employer helped determine/negotiate the terms of the benefits.
  - Have the voluntary benefits been included on the Form 5500 filed by the employer to report the welfare benefits offered to employees?
- Has the employer ensured that it is not receiving consideration for the benefits?
  - Ask questions regarding who receives commissions because of the voluntary benefits and how such commissions are being used.
  - Is the employer making an election/directing the broker as to how to use commissions?

Employers should be diligent in ERISA compliance, and evaluation of these factors can help ensure proper treatment of voluntary benefits as exempt under ERISA.

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[1] See, for example, *Brewer v. CHS/Community Health Systems et al.*, No. 1:25-cv-15578 (Dec. 23, 2025, N.D. Ill.); *Braham v. Lab. Corp. of Am. Holdings et al.*, No. 1:25-cv-15583 (Dec. 23, 2025, N.D. Ill.); *Pimm v. United Airlines Inc. et al.*, No. 1:25-cv-15581 (Dec. 23, 2025, N.D. Ill.); and *Fellows v. Univ'l Servs. of Am. LP*, No. 1:25-cv-10659 (Dec. 23, 2025, S.D.N.Y.).

[2] See Labor Regulation § 2510.3-1(j).

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